STATE OF MICHIGAN

COURT OF APPEALS

ROBERT H. ROETHER, Plaintiff-Appellant,	UNPUBLISHED September 16, 2003
v	No. 240447 Oakland Circuit Court
WORLDWIDE FINANCIAL SERVICES INC, Defendant-Appellee.	LC No. 01-029566-CK

Before: Whitbeck, C.J., and O'Connell and Gage, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Despite the convoluted set of facts in this case, we conclude that defendant did not make a misrepresentation to plaintiff and that the balance of plaintiff's claims are barred by the statute of frauds. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I

This case arises out of plaintiff Robert H. Roether's failed attempt to obtain a mortgage with defendant Worldwide Financial Services, Inc. Defendant's senior loan consultant, Howard Eisenshtadt, dealt with plaintiff. The wives of Eisenshtadt and plaintiff had a preexisting relationship; Eisenshtadt's wife was the supervisor of plaintiff's wife, Barbara. Because of their previous relationship, the Roethers contacted Eisenshtadt in April 2000 to obtain a mortgage for a proposed move to Ann Arbor. At the time, the Roethers owned a home in West Bloomfield. They had two mortgages on the West Bloomfield home.

Eisenshtadt gave the Roethers and their real estate agent a preapproval letter for a loan of $225,000 from defendant. According to the language of the letter, it was a conditional offer of preapproval for a loan and was not a contract to loan or actual approval for a specific loan. Eisenshtadt claimed he issued the certificate because he knew the Roethers well and knew plaintiff's business as an attorney in solo practice. Plaintiff countered that Eisenshtadt issued the preapproval certificate on the basis of a credit report and not on the parties' preexisting relationship. Plaintiff pointed out that the credit report was obtained the day before the certificate was issued.

Eisenshtadt stated that when he reviewed the credit histories, he considered them inadequate. The histories revealed that the Roethers had been a month late on their mortgage payment three times, and that they owed large sums of money to various other creditors (including having revolving credit balances with several different credit card companies). Moreover, defendant noted, plaintiff's income was not steady and he was solely responsible for his own income as a solo practitioner. The Roethers disputed this characterization of their credit and claimed that their financial situation qualified them for a mortgage loan of $265,000 in addition to their then-existing West Bloomfield home mortgages of $250,000.

Nevertheless, because of the inadequate credit history and unsteady income source, defendant asserted that plaintiff had to use the "stated income" method of applying for a mortgage loan, which required a larger down payment and was treated as more risky by most lenders. The parties also decided to make the application for the loan only in plaintiff's name to eliminate from consideration Barbara Roether's separate consumer debt. In addition, Eisenshtadt advised plaintiff to pay off some of his existing credit card debt to improve the appearance of his application. Finally, the parties decided to consolidate the two West Bloomfield home mortgages and use some of the equity to pay certain creditors, a list of which Eisenshtadt gave plaintiff.

In the interim, the Roethers signed an offer of purchase for a condominium in Ann Arbor. Plaintiff claimed he faxed Eisenshtadt the offer to purchase on April 14. Eisenshtadt testified he did not recall the fax, and there was no independent documentation of transmittal confirmation or receipt of the fax. Defendant pointed out that the purchase agreement itself states that the offer on the Ann Arbor condominium was made on April 15 and accepted by the seller on April 18.

Defendant stated that the Roethers closed on the consolidation loan on April 28, 2000, and obtained the proceeds from Eisenshtadt personally on May 3, when he reiterated the list of creditors that had to be paid with the funds. Eisenshtadt stated that the consolidation loan was at a higher interest rate but had a lower monthly payment and the Roethers were able to pay off $40,000 worth of debt that had less attractive interest rates. Plaintiff countered that his documentation showed his previous mortgage payments were *less* than the refinanced payment.

Eisenshtadt contended he did not have actual knowledge about the Ann Arbor purchase agreement until it was faxed to him on May 9. Eisenshtadt claimed that when he received notice of the purchase agreement, he immediately began the loan application process. Plaintiff contended that the shipping receipt indicated that Eisenshtadt did not send the application until too late – nine days later. During the course of the application process, Eisenshtadt requested an updated copy of the Roethers' credit report. It showed that they had used the funds from the consolidation loan to pay off Barbara Roether's individual debt instead of the list of creditors Eisenshtadt gave them. Moreover, Eisenshtadt learned that in addition to the Ann Arbor condominium, the Roethers sought to purchase an additional attached condominium, with only ten percent of the purchase price as a down payment. In Eisenshtadt's opinion, it was nearly impossible to find an investor to fund ninety percent of the purchase price with the Roethers' financial status. When Eisenshtadt raised the problem with plaintiff, plaintiff refused to put more than fifteen percent down.

Eisenshtadt testified he attempted to find an investor for plaintiff's proposed loan. According to Eisenshtadt, one investor preliminarily agreed, but later required that plaintiff sell

the West Bloomfield home first. Plaintiff produced a letter from that investor's legal counsel that stated that the company never amended the terms with Eisenshtadt on the basis of the additional condominium purchase. In fact, the investor's counsel stated that Eisenshtadt never told the company about the additional condominium and if he had, the company could not have financed the purchase anyway because plaintiff's debt ratio would have been too high.

There was no time to find another investor before closing on the Ann Arbor condominium. Eisenshtadt failed to obtain another mortgage, and the Ann Arbor purchase agreement fell through and the property was sold to someone else.

Subsequently, plaintiff filed this action alleging claims including misrepresentation, breach of fiduciary duty, Michigan Consumer Protection Act (MCPA) violations, and breach of contract. Plaintiff essentially claimed that defendant should have given him a mortgage and that plaintiff had been unaware of defendant's poor reputation and incompetence in the industry.[1] The trial court granted defendant's motion for summary disposition based on MCR 2.116(C)(10). Plaintiff now appeals.

II

Plaintiff's first and second issues on appeal concern the trial court's ruling that granting summary disposition on the claims including the MCPA count was in order because the statute of frauds bars plaintiff's claims. We hold that the statute of frauds does bar plaintiff's claims.

This Court reviews a decision on a summary disposition motion de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establish a genuine issue of material fact to warrant a trial. *Spiek*, *supra* at 337, citing *Singerman v Municipal Bureau, Inc*, 455 Mich 135, 138; 565 NW2d 383 (1997). This Court will give the nonmoving party the benefit of all reasonable inferences when determining whether summary disposition is appropriate. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 615; 537 NW2d 185 (1995).[2]

In his complaint, plaintiff cited the following violations of the MCPA:[3] (1) "fail[ure] to reveal material facts, the omission of which tended to mislead and/or deceive plaintiff, and which facts could not be reasonably known to plaintiff" (MCL 445.903[1][s], three counts); and (2) "making a representation of fact material to the transaction such that a person reasonably

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[1] Plaintiff stated that he and his wife later bought another condominium in Ann Arbor before selling their West Bloomfield home first.

[2] The trial court granted summary disposition primarily on the basis of MCR 2.116(C)(10).

[3] Plaintiff also stated in his complaint that defendant fits the prerequisite of being engaged in a "trade or commerce" as defined by MCL 445.902(d).

believes the represented or suggested state of affairs to be other than it actually is" (MCL 445.903[1][bb], two counts).

The Michigan statute of frauds provides in pertinent part:

> (2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
>
> (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.
>
> (c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.
>
> (3) As used in subsection (2), "financial institution" means a state or national chartered bank, a state or federal chartered savings bank or savings and loan association, a state or federal chartered credit union, a person licensed or registered under the mortgage brokers, lenders, and servicers licensing act, . . . sections 445.1651 to 445.1683 of the Michigan Compiled Laws, or . . . sections 493.51 to 493.81 . . . , or an affiliate or subsidiary thereof. [MCL 566.132.]

The trial court held that the "preapproval certificate" did not contain a promise for a specific loan in part because no terms of the loan were specified in the certificate. Our review of the certificate comports with the trial court's reasoning. The plain language of the certificate itself demonstrates it was not a contract for a loan; instead, it was a conditional offer of a loan. Because all contracts for a loan must be in writing and in this case there was no written agreement for a loan, plaintiff does not have an agreement with defendant that is enforceable. See *id*.; see also, e.g., *Marina Bay Condos, Inc, v Schlegel*, 167 Mich App 602, 606; 423 NW2d 284 (1988) (amended purchase agreement for a condominium was unenforceable under the statute of frauds because it did not contain essential terms). Because there was no agreement for a loan, defendant was not obligated to offer one to plaintiff regardless of any improprieties defendant or Eisenshtadt may have committed against the Roethers. See also MCR 2.116(C)(7) (summary disposition is appropriate where the nonmoving party's claim is barred by the statute of frauds).

Addressing plaintiff's MCPA claims specifically, plaintiff's first allegation under MCL 445.903(1)(bb) is that the preapproval certificate was "a representation of fact material to the transaction." As we have already explained above, the certificate was a mere offer, and therefore made no representation of "fact." Thus, that count fails. The rest of plaintiff's allegations under MCL 445.903(1)(bb) and 445.903(1)(s) hinge on bad or inaccurate advice plaintiff claimed it

received from defendant's agent, Eisenshtadt. The maxim "let the buyer beware" or "caveat emptor" applies to these allegations. See, e.g., *Wilkie v Auto-Owners Ins Co*, ____ Mich ____; 664 NW2d 776, 787-788 (2003) (affirming the principle of "freedom of contract" and overruling the rule of "reasonable expectations" in a contract for insurance); *M&D, Inc. v McConkey*, 231 Mich App 22, 34-35; 585 NW2d 33 (1998) ("our Supreme Court created two *negligence* exceptions to the general rule that caveat emptor prevails in real estate sales") (emphasis in original), citing *Christy v Prestige Builders, Inc*, 415 Mich 684; 329 NW2d 748 (1982).

If plaintiff did not like the terms and advice Eisenshtadt gave him, he did not have to accept the terms and do business with defendant. Plaintiff could have obtained a second opinion, or shopped around for another mortgage company with terms more to his liking. But plaintiff did not do so, and he had no contract with defendant stating terms that were misleading or deceptive. Consequently, the trial court properly ruled that plaintiff's claim is barred by the statute of frauds, including the MCPA claim. See MCL 566.132; *Wilkie, supra*.

III

Finally, plaintiff contends that the trial court erred in holding that plaintiff's misrepresentation claim fails because it alleged a future instead of present misrepresentation.[4] Plaintiff specifically alleged that defendant misrepresented to him that plaintiff's refinancing of his existing home mortgage with defendant would yield a favorable interest rate for plaintiff's future home mortgage with defendant. We disagree.

> A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981). The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a <u>fraudulent purpose</u> or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation. *Id*. at 118. Thus, the party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false. *Id*. at 117. Finally, in order to prevail on an innocent misrepresentation claim, *a plaintiff must also show that the plaintiff and defendant were in privity of contract*. *Id*. at 118-119. [*M&D*, *supra* at 27-28 (second emphasis added).]

[4] Plaintiff does not appeal the dismissal of the breach of fiduciary duty claim.

Because we have failed to discern a contract in existence between the parties, we also hold that the misrepresentation claim fails. See *id*. This was the nature of the trial court's ruling that alleging a "future" instead of a "present" misrepresentation was insufficient. The court held so because there was no present contract on which to base a present misrepresentation. Indeed, plaintiff claimed a misrepresentation on a fact that never came to pass – the favorable rate of interest on the new mortgage financing. In fact, the new mortgage was never obtained, and the parties did not have a contract. Consequently, plaintiff's misrepresentation claim is baseless. *Id*.; see also *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998).

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Hilda R. Gage